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No. 09-32

In the Supreme Court of the United States

JOHN A. BARRETT, JR. AND SHERYL S. BARRETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the salary paid to petitioner by the Citizen Potawatomi Tribe was exempt from federal income taxation.

2. Whether petitioner is liable for a penalty for underpaying his federal income taxes without reasonable cause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 561 F.3d 1140. The opinion of the district court (Pet. App. 22-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2009. The petition for a writ of certiorari was filed on July 6, 2009 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Citizen Potawatomi Tribe (the Tribe) is a federally recognized tribe of American Indians. Pet. App. 2 n.2. During the 1970s and 1980s, the Tribe was awarded judgments against the United States based on the

taking of its lands without adequate compensation. *Id.* at 3. The judgments were held in trust for the Tribe by the Secretary of the Interior. *Ibid.*

The distribution of the Tribe's judgment awards was governed by the Indian Tribal Judgment Funds Use or Distribution Act (Distribution Act), 25 U.S.C. 1401 *et seq.* As contemplated by the statute, the Tribe and the Secretary of the Interior developed a distribution plan for the judgment funds under which 70% of the funds would be distributed pro rata to the members of the Tribe and 30% would remain in trust. 48 Fed. Reg. 40,567 (1983); Pet. App. 3-4. The plan specified that the 30% of the funds still held in trust would be used for "the acquisition of additional lands to build upon the tribal land base, the development of the tribe's assets and to provide for the maintenance and care of the tribal property." *Id.* at 4. The Distribution Act provides that funds that are "distributed per capita or held in trust pursuant to a plan approved under the provisions of" the statute are not "subject to Federal or State income taxes." 25 U.S.C. 1407.

2. Petitioner John A. Barrett, Jr., is a member of the Tribe and has been involved with its governance since 1971. Pet. App. 2.[1] In 1985, he was elected chairman of the Tribe, and he has been re-elected chairman each year since then. *Ibid.* In 1996, petitioner decided that his salary as chairman could be paid from the earnings accrued on the Tribe's trust fund and that he would not be taxed on that income. *Id.* at 7. He instructed the

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[1] The tax return at issue in this case was filed jointly by Mr. Barrett and his wife, Sheryl S. Barrett. Pet. App. 1 n.1. Mrs. Barrett has joined in the petition for a writ of certiorari, but because her activities are not otherwise relevant to the case, this brief will refer solely to Mr. Barrett as "petitioner."

Tribe's accounting department not to withhold taxes from his compensation and not to issue him a Form W-2. *Ibid.* On their joint federal income tax return for 2001, petitioner and his wife did not report the compensation that he had received from the Tribe. *Ibid.*

Following an audit of the return, the Internal Revenue Service determined that petitioner's compensation was taxable income and that he was liable for an underpayment penalty under 26 U.S.C. 6662. Pet. App. 7. Petitioner paid the additional tax and penalty—which totaled approximately $23,000—and then sued for a refund. *Id.* at 7-8.

3. The district court granted summary judgment in favor of the government. Pet. App. 22-38. The court held that no applicable statute or treaty contained language that clearly exempted petitioner's salary from federal income taxation, and that the salary was therefore taxable. *Id.* at 33. The court also sustained the imposition of the penalty under Section 6662, holding that petitioner lacked "reasonable cause," see 26 U.S.C. 6664(c)(1), to believe that his salary was exempt from tax. Pet. App. 36-37.

4. The court of appeals affirmed. Pet. App. 1-21. Petitioner argued that, because his work as chairman included oversight of the Tribe's operations, the salary he received for that work could be considered part of the development of the Tribe and was therefore payable out of the tax-exempt trust funds. *Id.* at 10-11. The court rejected that contention, concluding that petitioner's "compensation for the oversight of day-to-day operations cannot be considered development under the expressed definition of the term" in the Tribe's plan. *Id.* at 11. The court also held that even if petitioner's salary satisfied the intended-use criteria governing the trust

funds, the tax-exemption provision on which petitioner relied was not sufficiently specific to exempt his income from taxation. *Id.* at 12-13.

The court of appeals also affirmed the underpayment penalty imposed on petitioner pursuant to Section 6662. Pet. App. 13-21. The court concluded that petitioner had not established reasonable cause for the underpayment. *Id.* at 20. The court explained that petitioner had "made no effort to ascertain his tax status beyond his own interpretation of the convoluted, historical legislation, revenue regulations, and tribal treaties," and that his "efforts to assess his proper tax liability for his salary as chairman were incredibly minimal—almost non-existent." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-17) that his salary as chairman of the Tribe was exempt from federal income taxation and that he should not have been subject to a penalty for underpaying his tax. The court of appeals correctly rejected those claims, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Section 1 of the Internal Revenue Code imposes a tax on "taxable income." 26 U.S.C. 1. The computation of taxable income begins with a determination of "[g]ross income," which is defined as "all income from whatever source derived." 26 U.S.C. 61(a). That definition "sweeps broadly" and is "subject only to the exclusions specifically enumerated elsewhere in the Code." *United States* v. *Burke*, 504 U.S. 229, 233 (1992); see *United States* v. *Centennial Sav. Bank FSB*, 499 U.S. 573, 583 (1991) (applying "the rule that tax-exemption and -deferral provisions are to be construed narrowly");

cf. *INDOPCO, Inc.* v. *Commissioner*, 503 U.S. 79, 84 (1992) ("an income tax deduction is a matter of legislative grace and * * * the burden of clearly showing the right to the claimed deduction is on the taxpayer") (citation omitted). Those principles are fully applicable to Native Americans, who except as dictated by "treaties or remedial legislation * * * are subject to the payment of income taxes as are other citizens." *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); see *Cook* v. *United States*, 86 F.3d 1095, 1097 (Fed. Cir.) ("Absent a definitely expressed exemption, Indians, like all other United States citizens, are subject to federal taxation."), cert. denied, 519 U.S. 932 (1996).

Petitioner contends (Pet. 10-15) that the Distribution Act exempts his tribal salary from federal income taxation, and he suggests (Pet. 2, 10) that a contrary interpretation of the statute would "usurp[] the legislation and electoral processes" of the Tribe "in the budgeting and implementation of the agreement as mandated by Congress." Petitioner is incorrect. The Distribution Act states that none of the funds paid to the Tribe and held in trust under an approved plan are subject to income tax. 25 U.S.C. 1407. The approved plan at issue here provides that the funds are to be used for certain specific purposes, including the acquisition of additional tribal lands, development of the Tribe's assets, and maintenance and care of tribal property. 48 Fed. Reg. at 40,568; see Pet. App. 4.

In petitioner's view (Pet. 13), because his duties as chairman included "day-to-day oversight of the development and execution of the various programs" under the plan, his salary is exempt from tax. That argument is flawed because, as the court of appeals noted, "the oversight of day-to-day operations cannot be considered de-

velopment" within the meaning of the approved plan. Pet. App. 11. More importantly, even if petitioner's duties as chairman could be construed as falling within the intended uses of the trust funds, the language of the statute regarding tax exemption does not explicitly encompass tribal officers' salaries. *Id.* at 12. Accordingly, petitioner's arguments are foreclosed by the principle that tax exemptions, including those for Indians, "are not granted by implication" but must be "definitely expressed" in statutory language. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 156 (1973) (citations omitted).

Petitioner does not contend that the decision below conflicts with any decision of this Court or any other court of appeals. To the contrary, the Tax Court and several courts of appeals have held that money received by Native Americans for serving as tribal council members—including money paid from tribal trust funds—is not exempt from tax. See, *e.g.*, *Allen* v. *Commissioner*, 91 T.C.M. (CCH) 673 (chairman of tribe liable for tax on his salary; fact that tribe is non-taxable entity is irrelevant), aff'd, 204 Fed. Appx. 564 (7th Cir. 2006); *Hoptowit* v. *Commissioner*, 78 T.C. 137, 145-148 (1982), aff'd, 709 F.2d 564 (9th Cir. 1983); *Jourdain* v. *Commissioner*, 71 T.C. 980, 987 (1979), aff'd, 617 F.2d 507 (8th Cir.), cert. denied, 449 U.S. 839 (1980); *Commissioner* v. *Walker*, 326 F.2d 261, 264 (9th Cir. 1964); *Doxtator* v. *Commissioner*, 89 T.C.M. (CCH) 1270, 1274 (2005); *Allen* v. *Commissioner*, 89 T.C.M. (CCH) 1310 (2005). Although the income from certain Indian lands may be tax-exempt, the payment of that income (or interest earned on trust funds derived from tribal lands) to tribal officers as compensation for services rendered is a tax-

able event. See *Hoptowit*, 709 F.2d at 566; *Walker*, 326 F.2d at 264.[2]

2. Petitioner also contends (Pet. 16) that the imposition of an underpayment penalty under 26 U.S.C. 6662 "improperly chills" the Tribe's ability to use "its sovereign power to appropriate income tax exempted funds." The penalty at issue in this case, however, was imposed on petitioner rather than on the Tribe. And, as the court of appeals pointed out, the record shows that petitioner unilaterally decided that his salary could be paid out of tax-exempt funds. Pet. App. 17-20. Petitioner provided no evidence that he sought professional advice, and he ignored the substantial body of case law cited above holding that Indian tribal salaries are not exempt from taxation. For those reasons, both lower courts correctly determined that petitioner had not shown "reasonable cause" for his underpayment so as to make the statutory penalty inapplicable. 26 U.S.C. 6664(d)(1); see Pet. App. 20; *id.* at 33-37. That factbound conclusion does not warrant this Court's review.

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[2] Amicus Citizen Potawatomi Nation suggests (Br. 6) that the decision below conflicts with *Ramsey* v. *United States*, 302 F.3d 1074 (9th Cir. 2002), cert. denied, 540 U.S. 812 (2003). That is incorrect. *Ramsey* did not involve the Distribution Act. Moreover, the court in *Ramsey* held, in accord with the decision below, that a tax exemption for Indians requires "express exemptive language * * * in the text of the statute." *Id.* at 1079.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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